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No. 90-1745

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

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1. Respondent bases much of his argument on the assertion that the Sentencing Reform Act "place[d] the resolution of all factors that would influence the release date of an incarcerated defendant in the hands of the sentencing judge." Br. 15. That assertion, however, does not accurately describe what Congress did in the Sentencing Reform Act.

The principal goals of the Sentencing Reform Act were to obtain consistency in the duration of imprisonment for similarly situated offenders, and to eliminate "uncertainty as to the time the offender would spend in prison." *Mistretta* v. *United States*, 488 U.S. 361, 366 (1989). See also S. Rep. No. 225, 98th Cong., 1st Sess. 44-49 (1983). The calculation of sen-

tencing credit has nothing to do with eliminating uncertainty as to the total *duration* of a defendant's prison term, but only with deciding how much of the sentence the offender has left to serve. Thus, awarding credit against a sentence for prior detention is fundamentally different from deciding *how long* the offender should spend in jail. It was the inconsistency and unpredictability in the latter decision that Congress sought to eliminate through sentencing reform. See S. Rep. No. 225, *supra*, at 46-48.

Although Congress stated that its goal was to maximize certainty in "the prison release date at the time of the initial sentencing," S. Rep. No. 225, *supra*, at 46, that statement should not be construed to require identification at sentencing of the exact day on which the prisoner will be released. As the Senate Report makes clear, what Congress sought to achieve was not certainty as to the release date as such—which corresponds only to the portion of the prison term the offender has left to serve—but certainty as to the total length of the period the defendant would spend in prison. The "grave defect of [preexisting] law" was that "no one is ever certain how much time a particular offender will serve" for the offense for which he was being sentenced. S. Rep. No. 225, *supra*, at 49. To remedy that defect, Congress designed a system in which, with the exception of good time credits earned in prison, the "sentence imposed by a judge * * * will represent the actual period of time that the defendant will spend in prison." *Id.* at 115; see also *id.* at 56.

Calculating the credit due at sentencing in order to fix a precise "release date" does violence to the terms of 18 U.S.C. 3585 and undermines the goal of eliminating sentencing disparities for similar offenders. The purpose of the sentencing credit provision,

like the Sentencing Reform Act as a whole, is to ensure that the length of the sentence the court imposes equals the amount of time the offender spends behind bars. As we note in our opening brief, not every prisoner begins to serve his federal sentence immediately after it is imposed. Prisoners such as respondent, who are borrowed from state custody for prosecution and sentencing, may begin to serve their federal sentence days, weeks, or even years after it is imposed, and may be eligible to receive credit for intervening periods of custody. See Gov't Br. 3-4 & n.2; see also, *e.g.*, *Causey* v. *Civiletti*, 621 F.2d 691, 693-694 (5th Cir. 1980) (offender returned to state custody following federal sentencing to stand trial on state charges); *Bloomgren* v. *Belaski*, 948 F.2d 688 (10th Cir. 1991) (defendant arrested by state authorities while free on federal appeal bond).

Section 3585 is designed to prevent an offender who begins to serve his federal sentence following an intervening period of detention from being confined for a longer period than an offender who begins to serve his federal sentence immediately. If the sentencing court has the responsibility for calculating sentencing credit under the statute, however, the total period that a defendant spends in incarceration will depend on the timing of his sentencing, not on the length of the sentence he receives.[1]

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[1] Respondent maintains (Br. 9) that the sentencing court must determine "the availability of prior jail time credits" because the time the defendant has already served on his sentence "inevitably [will] inform[]" the court's choice of a sentence within the sentencing range under the Sentencing Guidelines, or its decision to depart from the Guidelines range. Respondent's suggestion that the time a defendant has already spent in custody—or, alternatively, the portion of the

That Congress could not have intended this result is apparent from the plain terms of Section 3585, which states that periods of detention up to the time an offender commences to serve his sentence—not just up to the time of sentencing—shall "count" toward the sentence. That aspect of the statute cannot be squared with the sentencing court's exercise of the exclusive authority to award sentencing credit. Contrary to respondent's suggestion (Br. 15), sentencing credit is thus quite similar to good time credit, in that it is "not subject to determination at the time of imposition of sentence." Congress recognized this fact in the structure and wording of Section 3585. See Gov't Br. 12-13. Congress also required that events both before and after sentencing be taken into account in the credit calculation by explicitly banning the awarding of double credit for the same period of detention. As we explained in our opening brief, at 13-17, the double credit ban is unworkable if the calculation of sentencing credit is not timed to reflect post-sentence events. Unlike BOP, the sentencing court cannot make routine post-sentence adjustments in the calculation of sentencing credit.[2]

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sentence that remains to be served—is a proper or unavoidable consideration in fixing the total length of sentence is contrary to the spirit and terms of Section 3585. In mandating the award of full credit against the total length of sentence for eligible periods of detention, Congress decided that such periods, whether served before sentencing or after, were to be regarded as equivalent for the purpose of satisfying the sentence. Increasing the length of the sentence to discount time previously served would undermine Congress's evident intention to give full credit for eligible periods of incarceration that predate sentencing.

[2] Respondent contends that BOP's authority to adjust sentencing credit in response to an award of credit against a state

Respondent suggests (Br. 18 n.3) that a sentencing court can take post-sentence periods of detention into account by stating, in its judgment and commitment order, that, in addition to receiving a precise amount of credit for presentence detention, the offender "will also receive credit for the days between imposition of sentence and arrival at the prison." Upon the offender's arrival at prison, respondent argues, the administrator has "only to add these two figures to the time in custody at the institution" to determine the release date. *Ibid.* Respondent's proposal rests on the unwarranted assumption that the sentencing court can predict whether the offender will be entitled to credit for the entire period between sentencing and the commencement of his sentence. That determination depends on many factors, including whether the offender is in custody during the entire period, whether the custody in question counts as "official detention" eligible for credit, and whether the time is credited to another sentence. Those circumstances, by definition, cannot be known at the time of sentencing, but must be determined by the administrator charged with carrying out the court's order. Thus, respondent's pro-

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sentence that is imposed after federal sentencing undermines the State's authority to "choose whether to order its sentence concurrent or consecutive, vary the length of the sentence within the limits of state sentencing laws and any plea agreement, and, if the defendant is in state custody, choose whether to release the defendant for the service of the federal sentence." Br. 23. BOP's decision to adjust credit on a federal sentence to take into account a redundant state award in no way trenches on the State's authority to sentence as it chooses and to award credit against a state sentence for a period of prior custody. Rather, it ensures that the same period of detention is not credited against more than one sentence in defiance of federal law.

posal effectively amounts to a delegation to BOP of responsibility for calculating post-sentence custody credit, with the courts retaining authority to calculate presentence custody credit. That is no different in practice from a system of concurrent authority over sentencing credit. Yet even respondent acknowledges (Br. 17 n.2) that Congress did not intend the courts and BOP to exercise "shared responsibility" in this area.[3]

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[3] Respondent cites (Br. 23) Fed. R. Crim. P. 35(a)(2) and (c) as providing a mechanism for correcting or adjusting jail credit after sentence is imposed. As we explained in our opening brief (at 27-29), Rule 35(a) and (b) would not permit the recalculation of sentencing credit in many cases in which Section 3585 would mandate correction of the credit award. Similarly, new subsection (c) of Rule 35, effective December 1, 1991, which permits the sentencing court to correct a sentence "imposed as a result of arithmetical, technical, or other clear error" within 7 days after sentencing, would enable the court to recalculate credit in only a small percentage of those cases in which an adjustment would be necessary.

Respondent also implies (Br. 23) that a court could alter a sentence to adjust for post-sentence events under 18 U.S.C. 3582(c), which authorizes the court, on motion of the Director of BOP, to reduce a term of imprisonment once it has been imposed "if it finds that extraordinary and compelling reasons warrant such a reduction." First of all, this section only provides for a reduction in sentence, which would not enable a court to correct for a redundant credit award. In any event, as the Senate Report and the provision itself make clear, the section was enacted to cover a "relatively small number" of "unusual cases" marked by "extraordinary and compelling circumstances," such as "severe illness" or a subsequent amendment of the Sentencing Guidelines "to provide a shorter term of imprisonment" for the same offense. S. Rep. No. 225, *supra*, at 55-56; see also Section 3582(c)(1) and (2). It is unlikely that Congress intended district courts to make routine use of that provision to modify sentencing credit awards without mentioning that purpose as well.

Respondent ultimately concedes, as he must, that some offenders will not receive the credit to which they are entitled because no procedure is available for the court to award credit after sentence is imposed. Br. 23-24. In effect, respondent concludes that achieving "uniformity and certainty" in federal sentencing requires sacrificing compliance with the plain terms of Section 3585. But that tradeoff is unnecessary if Section 3585 is construed to preserve BOP's traditional authority to calculate sentencing credit. Uniformity and consistency in sentencing is possible only if Section 3585 is applied according to its terms: only then will the length of the sentence imposed correspond to the period of imprisonment that the offender actually serves, regardless of the date the federal sentence begins. If BOP makes detention credit calculations, the length of the sentence can readily be conformed to the letter of Section 3585.

2. Respondent notes that, in explaining its decision to abolish the Parole Commission, Congress rejected the argument that the Commission was capable of imposing sentence with greater uniformity and consistency than the district courts. Respondent urges this Court (Br. 11-12, 16-17) to reject the government's argument that BOP can achieve greater uniformity and consistency than the courts in calculating sentencing credit.

Respondent draws a false comparison between the Parole Commission's role in sentencing and BOP's function in calculating sentencing credit. In deciding to abolish the Parole Commission, Congress recognized that the Commission performed essentially the same function as the sentencing court: determining the length of sentence. Like the sentencing court, the Parole Commission exercised "very broad discretion," *Mistretta*, 488 U.S. at 363, in deciding how long an

offender would remain in prison. Under guidelines adopted by the Parole Commission in 1973, the parole decision still remained a complicated inquiry that was "particularly judicial in nature." S. Rep. No. 225, *supra*, at 54; see also *Mistretta*, 488 U.S. at 363-367.

Congress found that the system of dual sentencing, in which the court and the Commission exercised considerable discretion over the ultimate length of sentence, resulted in unpredictable and inconsistent sentences for similarly situated offenders and in disparities between the sentence imposed and the term actually served. *Mistretta*, 488 U.S. at 365; S. Rep. No. 225, *supra*, at 54-55. To remedy those shortcomings, Congress proposed to eliminate the dual sentencing system and consolidate in the courts the authority to "determine[] the actual duration of imprisonment." *Mistretta*, 488 U.S. at 365; S. Rep. No. 225, *supra*, at 46; see *id.* at 52-56.

BOP's role in calculating sentencing credit, in contrast with the Parole Commission's role before sentencing reform, is not redundant of the court's sentencing function, nor has it historically contributed to disparities and uncertainties in sentencing. There is a fundamental difference between imposing sentence—which involves fixing the magnitude of a term of imprisonment—and deciding how much of that sentence an offender has left to serve. Moreover, the calculation of sentencing credit, unlike the core sentencing function that the Parole Commission previously performed, is not "particularly judicial in nature." S. Rep. No. 225, *supra*, at 54. It does not require the weighing of a complicated array of factors, but instead calls for finding particular facts and applying technical rules to those facts.

The comparison respondent seeks to draw between the Parole Commission and BOP is inapt for the additional reason that, in comparing the Parole Commission's performance with its assessment of the district court's ability to carry out the sentencing function, Congress assumed that the courts would be operating within the proposed guidelines system. In contrast, Congress has not explicitly provided for the creation of guidelines to govern the court's calculation of sentencing credit. Thus, the courts have no uniform rules for the administration of the sentencing credit provision. See Gov't Br. 24. BOP, on the other hand, has operated under nationwide guidelines that address the range of circumstances bearing on the calculation of sentencing credit. For this reason, BOP is far more likely to perform the task of awarding credit in a consistent and uniform manner than the district courts.[4]

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[4] Respondent suggests that the court can give "appropriate consideration" to BOP guidelines regarding jail credit. Br. 21. If respondent means to say that the credit award decision should be made in accordance with BOP guidelines, it makes little sense to have the courts, rather than BOP, apply those guidelines. Indeed, if BOP is held not to have any statutory responsibility for making credit determinations, it is not clear why it would be within BOP's authority to promulgate such guidelines any more than it would be within the authority, for example, of the Executive Office of United States Attorneys. Although BOP has published an abbreviated set of interim rules under Section 3585 to replace the comprehensive guidelines developed under the predecessor provision, 18 U.S.C. 3568 (1982), see Gov't Br. App. 15a-18a, and is in the process of developing a more elaborate set of rules, it has not yet issued permanent guidelines under Section 3585. BOP would have no reason to do so if it lacks authority over sentencing credit awards.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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